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Ohio Township Association Risk Management Authority

UPDATE

Above photo courtesy of Pike Township, Fulton County.

SUMMER 2023

Congress Passes Pregnancy-Accommodation Statute and Updated Nursing Mothers Law: What Employers Need to Know

By Paul LaFayette, R. Victoria Fuller, and Emily Kowalik

Two new federal laws aimed at increasing protections for pregnant and breastfeeding employees will go into effect in 2023: the Pregnant Workers Fairness Act ("PWFA") and the Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP For Nursing Mothers Act"). Employers should familiarize themselves with the new employee protections and employer obligations under both laws.

The Pregnant Workers Fairness Act

The PWFA appears to substantially increase protections for employees and job applicants with known limitations relating to pregnancy, childbirth, or related medical conditions. It applies to employers with 15 or more employees and will go into effect on June 27, 2023.

The PWFA closes gaps in federal discrimination laws in two ways:

- **Discrimination.** The PWFA specifically prohibits discrimination against employees and applicants with known limitations relating to pregnancy, childbirth, or related medical conditions.
- **Reasonable Accommodations.** The PWFA entitles covered employees to a reasonable accommodation unless the accommodation would impose an undue hardship on the operations of the employer. As with other disabled employees, the employer must engage in the interactive process with the employee in order to discuss and determine the reasonable accommodation. The obligation to engage in the interactive

Cont'd on pg. 2

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Cont'd from pg. 1

process is triggered when the employer becomes aware of an employee's "known limitation" arising out of a pregnancy, childbirth, or related medical condition.

Moreover, PWFA prohibits employers from:

- Dictating the accommodation to the employee, including forcing the employee to take paid or unpaid leave. The employer must engage in the interactive process;
- Refusing to hire or provide other employment opportunities to a qualified employee if the denial is based on the need to make a reasonable accommodation; and
- Retaliating against an employee for requesting or using a reasonable accommodation related to the employee's pregnancy, childbirth, or related medical conditions.

There are a lot of open questions on how the PWFA will apply to a variety of fact patterns, including what is a "related medical condition." For now, however, employers need to be aware of the upcoming obligations that begin in late June 2023 so they can at least further assess employee situations as they come up that may fall under the PWFA. The PWFA also directs the EEOC to issue regulations specifically providing examples of reasonable accommodations related to an employee's pregnancy, childbirth, or related medical conditions.

Employers should note that the PWFA diverges from the ADA in one important respect – it defines a "qualified" employee or applicant as including:

- An employee or applicant **who cannot perform an essential function of the job** for a temporary period, where;
- The essential function could be performed in the near future; and
- The inability to perform the essential function can be reasonably accommodated.

Therefore, under the PWFA, the employer may need to temporarily reassign the employee's duties to another employee, or put them on hold, where possible, until the conclusion of the pregnancy, childbirth, and/or related medical condition.

The PUMP For Nursing Mothers Act

Signed on December 29, 2022, the PUMP For Nursing Mothers Act amended the Fair Labor Standards Act ("FLSA") to entitle all employees (not just non-exempt employees) to unpaid reasonable break time to express breast milk up to one year after the employee's child's birth. The Act requires that breaks be provided "each time such employee has need to express the milk."

The Act also requires employers to provide a private location to express milk that is not a bathroom. Employers should be aware that an employee must be compensated for pumping breaks if such a break must be paid according to other federal, state, or local laws; the employee is not completely relieved of duties during the entirety of the break; or if they express breast milk during an otherwise paid break period.

The PUMP for Nursing Mothers Act contains a small employer exception for employers with fewer than 50 employees where compliance would cause an undue hardship.

Employer Takeaways

Employers should respond to the PWFA and Pump for Working Mothers Act by:

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REILY TOWNSHIP'S VOLUNTEER FIRE DEPARTMENT NAMED 2023 OHIO FIRE DEPARTMENT OF THE YEAR

Members of Reily Township's all-volunteer fire department were surprised, honored, and humbled upon learning their operation was named Ohio's 2023 Fire Department of the Year.

This is the second time the department has been recognized for its service by the State of Ohio Fire Marshal. In 2013, the department was recognized as the best of the state's volunteer departments. This year, it won best department outright.

Specialized equipment and services have allowed the department to stand out. Reily Township has one of only two large animal rescue services in the state and can also perform grain bin rescues. These areas of specialization make the department unique to the tri-state area.

Sean Leventen, Reily Township Firefighter, has extensive familial ties to volunteer firefighting. He expressed pride in the all-volunteer department and how it excels at special services as well as firefighting and EMT care. He said the department has modernized recently to provide services more efficiently. Being a small, rural department, using technology has helped the unit do more with less. Yet, even with these enhancements and award-winning services, the volunteer fire department still does not charge residents for its services. As a result, people are more likely to call if help is needed.

The department of over 30 volunteers traveled to Columbus to be presented with a plaque from the State of Ohio Fire Marshall and Hall of Fame. Leventon said this makes it worth the extra time put into training, getting up late at night and going on runs. He emphasized, "To get recognized like this is amazing."

Reily Township is a rural community of approximately 2,665 residents in Butler County of Southwest Ohio. To learn more, please visit www.reilytownship.org/.

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- **Updating Policies and Procedures.** Employers should promptly update policies and reasonable accommodation procedures as necessary to reflect the new protections provided by the PWFA and the PUMP for Working Mothers Act. Note that neither law is pre-empted by state or local laws that provide greater protections to employees.
- **Training.** Employers should train Human Resources professionals and all managers to ensure they are aware of the new laws and updated policies and procedures for responding to covered employees. In particular, managers should be aware that, under the PWFA, covered employees who cannot perform the essential functions of their job are still entitled to a reasonable accommodation so long as the additional criteria noted above are met.
- **Identify a Private Space for Breastfeeding Mothers.** Employers should endeavor to establish a location and/or plan to accommodate breastfeeding mothers, particularly where a private locked room may not be available in the workplace.

For more information, please contact Paul LaFayette with Freeman Mathis & Gary, LLP at Paul.LaFayette@fmglaw.com.

Paul LaFayette is a Partner at Freeman Mathis and Gary's Columbus office. Mr. LaFayette concentrates his practice on professional liability defense, and regularly represents governmental entities in litigation and as general counsel. Mr. LaFayette has extensive experience in representing clients in lawsuits involving professional malpractice, premises liability, contracts, employment, construction, civil rights, zoning, wrongful death, and products liability.

THREE MORE KEY CYBER CONTROLS FOR TOWNSHIPS

This is the second article in a series of articles addressing key cyber controls. The next three controls include: **Network Access Controls, Content Filtering Solutions, and Patch Management.**

Network Access Controls, Content Filtering Solutions, and Patch Management are all critical components of modern cybersecurity strategies. These technologies work together to create a comprehensive approach to securing networks and data from cyber threats. We will explore each of these technologies in detail and discuss their importance in protecting networks and data.

Network Access Controls (NAC) is a technology that allows townships to control who has access to their networks and what they can do once they are connected. NAC solutions typically include authentication, authorization, and accounting (AAA) functionality to ensure that only authorized users and devices are allowed on the network. NAC can also enforce security policies such as requiring the use of strong passwords, requiring the use of encryption, and limiting access to sensitive data.

NAC can be implemented in several ways, including **endpoint-based agents**, **network-based agents**, and **agentless solutions**. Endpoint-based agents are installed on individual devices and communicate with the network to ensure that they meet the entity's security requirements. Network-based agents are installed on network devices such as switches and routers and monitor traffic to ensure that only authorized devices are allowed on the network. Agentless solutions use network protocols to identify devices and apply security policies without the need for additional software.

Content filtering solutions are used to restrict access to certain types of websites or content based on pre-defined rules or policies. Content filtering can be used to block access to websites that are known to be malicious, contain inappropriate content, or are not related to the end user's work. Content filtering solutions can also be used to monitor network traffic and block attempts to download or upload sensitive data.

Content filtering solutions can be implemented in several ways, including network-based solutions and endpoint-based solutions. Network-based solutions typically use a proxy server to filter web traffic, while endpoint-based solutions use software installed on individual devices to filter traffic at the device level.

Patch Management is the process of applying software updates or patches to fix security vulnerabilities in operating systems, applications, and other software. Patch management is critical to maintaining the security of a network as cybercriminals often exploit known vulnerabilities to gain access to networks and data. Patch management also helps townships avoid costly data breaches.

Patch management can be a lengthy manual process, particularly in townships with many devices and software applications. Automated patch management tools can simplify the process by automating the detection, deployment, and verification of patches. These tools can also generate reports to help townships track patching progress and identify devices that are not up to date.

Network Access Controls, Content Filtering Solutions, and Patch Management are critical components of a cybersecurity strategy and are also important strategies to have in place when maintaining cyber insurance. These technologies work together to provide multiple layers of protection against cyber threats, including unauthorized access, malware, and data breaches. It is essential for townships to prioritize these technologies as part of their cybersecurity strategy to ensure data is protected and to create a secure network. If you have cybersecurity questions, feel free to contact the OTARMA Cyber IT Risk Control Specialist, Aaron Willis, at aaron.willis@sedgwick.com or call (614) 290-9398.

OHIO RECREATIONAL USER IMMUNITY

Did you know protections are available for Ohio's public entities pursuant to the Ohio Recreational User Immunity Statute?

By Jim Schirmer, Surdyk, Dowd & Turner

The summer and autumn in Ohio present wonderful opportunities to enjoy all that our great parks and recreation areas have to offer. Every day, Ohioans enjoy hiking and bike trails, festivals, sports leagues, and more, providing countless opportunities to get out and enjoy the great outdoors.

Unfortunately, recreational activities come with attendant risks. From a slip and fall to more serious accidents, injuries are likely to happen when people engage in physical activity. When that happens, litigation often ensues. Fortunately, Ohio law clarifies when property owners, which in these cases are often public entities that own and operate parks and other recreational areas, can be held liable for injuries occurring on their premises.

Ohio's recreational user immunity statute, Revised Code Section 1533.181, provides that property owners are not liable for injuries to recreational users caused by defects in the premises themselves or by the actions of the recreational user. The statute defines a recreational user as a person who has permission to "hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel-drive motor vehicle, or to engage in other recreational pursuits" on non-residential premises. This definition has been interpreted to include "other recreational pursuits" such as baseball and softball (including spectators), horseback riding, and playing on swings or other playground equipment.

To determine whether property owners are liable to a recreational user who is injured during a recreational pursuit, courts in Ohio look to the purpose for which the property is held open to the public, whether a fee was paid to enter the premises, and if a fee is paid, the purpose for which the fee is paid.

Traditionally, this protection has only applied to parks and other outdoor spaces. The Ohio Supreme Court has held that "completely enclosed, man-made facilities," such as a gymnasium, are not covered under the statute, and the use of such does not make a person a "recreational user" as imagined by the statute. See *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 502 N.E.2d 611. In that case, the Court recognized the recreational user immunity statute as being passed, in part, to conserve natural resources, and since building a gymnasium was not meant to "conserve natural resources," the statute did not apply. But just because a park or outdoor recreational space has buildings and structures does not take it outside of the statute's protection; the recreational user immunity statute protects property owners and properties whose "essential character" fits within the intent of the statute to conserve natural resources. See *Miller v. City of Dayton* (1989), 42 Ohio st.3d 113, 114, 537 N.E.2d 1294. So, a park with restrooms, fences, or a clubhouse would still be protected by recreational user immunity.

Immunity does not apply to ordinary patrons who pay a fee for entry. When a fee is paid, the property is not considered "held open to the public," and therefore the property owner has a duty to

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patrons to keep the premises safe, regardless of whether the patrons are engaging in a recreational pursuit. However, if no fee is paid to enter or enjoy a park or other property, and that property is held open to the public for recreational purposes, the property owner is entitled to recreational user immunity. The permission to use the property may be either express invitation or through acquiescence. This can be from signs welcoming individuals onto the property or even information contained on websites or promotional materials about recreational events and activities taking place on the property.

If no fee is paid *for entry*, but is instead charged for other purposes or activities such as renting a cabin or utilizing a power outlet for an RV or trailer, the recreational immunity statute would not protect the property owner for injuries related to the things for which the fee was paid. For example, if a patron paid a fee to rent a cabin and is injured due to a defect in the cabin, the property owner may be liable. However, if the patron paid a fee to rent a cabin in a park and was injured while playing soccer elsewhere on the premises which are held open to the public to engage in such activities free of charge, the recreational user immunity statute would apply to the injured soccer player.

But what happens when a park charges a fee for parking, but not for entry, *per se*? It is likely that, just as paying a fee for a cabin opens the property owner to liability related to the cabin, charging a fee for parking would open the property owner to liability related to parking, especially if there are alternative methods of entering the park. While a court may interpret a parking fee as an "entry fee" if the park is only accessible by parking a car on the premises, if the park is accessible through a bike path or other entry a court may not reach the same conclusion, instead interpreting the parking fee as separate from an "entry fee."

The purpose for which the property is held open to the public is also important when determining whether the recreational user immunity statute applies. When an injury occurs due to the premises themselves, the analysis does not depend upon the status of the entrant of the property as, for example, a trespasser, or the activity in which the party was engaged, such as walking in the parking lot. Instead, the statute operates to protect the landowner from liability when the landowner opens the property to the public for all to engage in recreational activities. The key analysis here should focus on the nature and scope of the activity for which the premises are held open to the public, not the particular activity the user was engaged in when the injury occurred. For example, if a cyclist commutes to a friend's house utilizing a bike path that passes through a park held open to the public free of charge, the park owners are immune from liability to the cyclist. Even though the cyclist is merely "passing through," rather than utilizing the property specifically for the activity of cycling, recreational immunity will apply.

Warm months in Ohio provide opportunities to gather and build community. Ohio's parks and recreational areas play a crucial role in doing so, and the Ohio legislature has provided protections for property owners to provide space for this purpose and to conserve Ohio's natural environment. It is important to know when and how provisions like the recreational user immunity statute apply and what responsibilities property owners have so that Ohioans may safely enjoy all that Ohio has to offer.

Jim Schirmer is a graduate of The Ohio State University Moritz College of Law and joined Surdyk, Dowd & Turner in 2021. Jim focuses his practice on defending political subdivisions and their employees. Contact Jim Schirmer with additional questions at jschirmer@sdtlawyers.com.

OHIO SUPREME COURT EXPANDS EXCEPTION TO POLITICAL SUBDIVISION IMMUNITY

By Holly Marie Wilson and Brianna Prislipsky, Reminger

Ohio's public subdivisions and their employees are generally immune to most common law tort claims unless one of five enumerated exceptions to immunity applies. Traditionally, Ohio courts have narrowly applied these exceptions in favor of immunity. Recently, however, in a split 4-3 decision, the Supreme Court of Ohio, in *Doe v. Greenville City Schools*, Slip Opinion No. 2022-Ohio-4618, permitted a lawsuit to proceed against a public school district by two students injured in a classroom accident. Though the school district asserted political subdivision immunity under Ohio Revised Code 2744.02, the Court found that immunity was not applicable due to an exception limiting immunity in cases where injury arises out of "physical defects" on property used to perform governmental functions.

In December 2019, two students at Greenville City Schools were injured when a bottle of isopropyl alcohol caught fire and exploded in a science class. The students sued the school, alleging that it failed to implement proper safety procedures or provide safety equipment, such as fire extinguishers in the classroom.

The school filed a motion to dismiss based upon statutory immunity under R.C. 2744, which generally precludes claims against a political subdivision, save for specifically enumerated exceptions to liability. In response to the school's motion to dismiss, the students argued that the school's immunity was subject to such an exception, which applies to injuries sustained due to physical defects within or on the grounds of a building used for a government function. The students claimed that the school's lack of proper safety equipment constituted a "physical defect," such that the exception to immunity would apply.

Ultimately, the case made its way to the Supreme Court of Ohio, where the school argued that a lack of safety equipment could not constitute a physical defect under Ohio law, as the equipment is not a "fixture" or part of the real estate.

In finding that the absence of safety equipment constituted a "physical defect" as contemplated by R.C. 2744.02, the Court recognized prior opinions which had held that other types of defective equipment, such as dilapidated safety nets, loose bolts in sporting equipment, and unstable bleachers, could be considered physical defects. It then expanded that rationale to the absence of arguably necessary safety equipment. Consequently, the school's motion to dismiss was unsuccessful, and the case was remanded to the trial court for further proceedings.

In future cases, political subdivisions seeking to rely upon Ohio's statutory immunity will need to evaluate whether the claims against them could properly be construed as arising out of a physical property defect, given the broad reading used by the Supreme Court in *Doe*. In doing so, entities should be cognizant that the term "defect" may be applied to faulty and improperly maintained equipment and the absence of certain standard safety equipment.

Should you have any questions regarding the Doe decision, Ohio's political subdivision immunity statute or other issues pertaining to the defense of political subdivisions, please do not hesitate to reach out to one of Reminger's Governmental Liability specialists.

Holly Marie Wilson focuses her practice on litigation that encompasses a range of interconnected legal disciplines. She leverages her years of experience and a willingness to understand her clients' strategic goals in employing sensible and successful approaches to the defense of each dispute, including professional liability, retail and hospitality, employment practices, and public entity liability. Contact Holly at hwilson@reminger.com.

Brianna Prislipsky is an associate attorney in Reminger Co. LPA's Cleveland office. She focuses her practice on appellate advocacy, insurance coverage, professional liability, and employment law. Brianna first joined the firm as a law clerk in Reminger's Youngstown office, where she gained valuable experience in all aspects of litigation, including complex brief writing. Contact Brianna at bprislipsky@reminger.com.

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THANK YOU, OTARMA MEMBERS, FOR YOUR PHOTOS!

Every year, OTARMA relies 100% on its members to partner with the marketing team, which allows us to create a memorable calendar. OTARMA Members' photos highlight what makes Ohio townships so special – large and small, urban and rural, in every county and corner of the state.

OTARMA is pleased to take this opportunity to thank all members who made this year's OTARMA 2023 calendar the best one ever! Every photo is appreciated – the full-page images as well as the images that are needed in smaller spaces.

2023 Calendar Cover
Danbury Township, Ottawa County
Photographer: Dianne Rozak

December 2022
Rootstown Township, Portage County
Photographer: Jordan Michael

In this issue of the OTARMA newsletter, we wish to acknowledge members whose photos were selected to represent the 2023 calendar cover, and full-size pages for December 2022, and January through March 2023.

February 2023
Pike Township, Fulton County
Photographer: Vickie Wagner

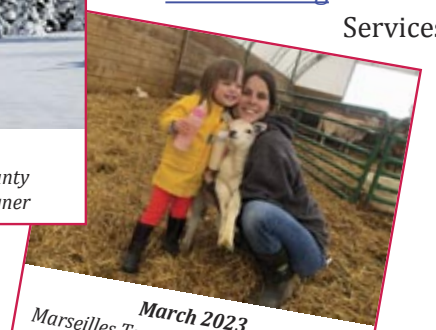
OTARMA calendars are mailed to every township in Ohio, so what a wonderful opportunity to showcase your township throughout the state!

January 2023
Henrietta Township, Lorain County
Photographer: Kathy Beal

Work is already underway for the 2024 OTARMA calendar. We encourage you to submit photos of your holiday parades, celebrations, sporting events, parks and conservation areas, arts and crafts shows, historic buildings, citizens, township officials, employees, and volunteers working to keep your communities safe.

In upcoming issues of the OTARMA Update Newsletter, we will continue to acknowledge members whose photos were selected for the remaining months of 2023, including other full-size pages in the calendar.

For photo submission guidelines, go to OTARMA.org and click on Member Services.



March 2023
Marseilles Township, Wyandot County
Photographer: DeAnn Funkhouser